Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1690

WAYNE A. STANTON, individually and as the Administrator of the Indiana Department of Public Welfare,

Petitioner,

v.

ELIZABETH BROWN and JAMES BROWN by his next friend MICHAEL BROWN, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Elizabeth Brown and James Brown, by his next friend, Michael Brown, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, appears in Petitioner's Appendix at p. A-1. The court of appeals' amendment of that opinion, dated February 29,

1980 appears in Respondents' Appendix at p. A-1. The opinion of the District Court for the Southern District of Indiana appears in Petitioner's Appendix at p. A-18.

QUESTIONS PRESENTED

Pursuant to Rule 40(3) of the Rules of the Supreme Court of the United States, respondents concur with petitioner's statement of the second question as it appears in his Brief, p. 2, but restate question #1.

1. Whether 42 U.S.C. § 1396a(a)(17) prohibits states participating in the Medicaid program from deeming that a certain portion of a non-institutionalized spouse's income and resources is available for the partial payment of an institutionalized spouse's nursing home care even when the deemed amount is tailored to her own particular ability to pay and, further, whether the statute requires states, in the event the non-institutionalized spouse fails to pay her assigned portion, to make an upward adjustment in the amount of Medicaid benefits they pay on behalf of the nursing home resident.

STATEMENT OF THE CASE

Pursuant to Rule 40(3) of the Rules of the Supreme Court of the United States, respondents concur with petitioner's statement of the case but wish to make two clarifications. First, the Browns filed this lawsuit challenging state regulations which deemed part of Mrs. Brown's income and *resources* (bank accounts and life insurance policies) to be available for Mr. Brown's support. Second, the court of appeals remanded the case to the district court to determine an appropriate award of attorney fees only if the district court first found that the requested fees were not exorbitant and that no special circumstances existed to render an award unjust.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Appeals Fully Considered and Correctly Decided All Issues Regarding the Proper Interpretation of 42 U.S.C. § 1396a(a)(17).

James Brown, respondent herein, is an adjudicated incompetent whose son, Michael, acts as his guardian. Mr. Brown, suffering from chronic brain syndrome, is unable to remember simple facts, refuses to change clothes or bathe, and is unable to control his body functions. Unable to care for or control her husband and upon a physician's recommendation, Elizabeth Brown, James' wife of thirty-five (35) years, arranged to have him moved into a nursing home in October 1978. At this same time she contacted the Welfare Department to request that James Brown be certified as eligible for participation in the Medicaid program which is a jointly-funded (federal-state-county) welfare program designed to provide medical assistance to low income persons. The Welfare Department certified James as Medicaid eligible but required that Mrs. Brown, in accordance with a uniformly applied mathematical formula embodied in state regulations, pay part of the nursing home expenses out of her own income and resources.

The Browns were in a dilemma because Elizabeth was simply unable to pay her assigned share to the nursing home and James desperately needed professional, twenty-four (24) hour care. Rather than obtain a divorce, which would have rendered Mr. Brown totally eligible in his own right, they challenged the state regulations in federal district court. On February 16, 1979, the court declared that the regulations were contrary to 42 U.S.C. § 1396a(a)(17) insofar as they acted to arbitrarily and irrebuttably assume or deem that certain portions of Mrs. Brown's income and

resources were "available" for the cost of her husband's care when, in fact, they were not. The court ordered the defendant welfare officials to tailor Mrs. Brown's financial obligations to her individual ability after taking into account all of her other needs and obligations. On appeal, the Seventh Circuit affirmed the district court's order for individualized treatment of non-institutionalized spouses like Mrs. Brown. Petitioner's Appendix, p. 5.

However, the Seventh Circuit also addressed a "second level of inquiry" and held that Indiana could not assume that an able spouse would always actually pay her assigned share to the nursing home. The court reasoned that if Indiana were allowed to deem an able spouse's contribution to the cost of the spouse's nursing home care, then upon her refusal to actually so contribute, the Medicaid recipient would be in an extremely vulnerable position "raising the spector of eviction" from the nursing home. See Petitioner's Appendix, p. 1.

But even more importantly, the Seventh Circuit ruled that 42 U.S.C. § 1396a(a)(17) could not be internally consistent with any other interpretation. That statute provides:

> (a) A state plan for medical assistance must—
> (17) include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . , (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any appli-

> cant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child . . .

Specifically, the Seventh Circuit held that Indiana was authorized by subpart (D) of § 1396a(a)(17) to require non-institutionalized spouses to defray part of the cost of their spouse's nursing home care, but that subpart (B) required Indiana, in determining the exact amount of Medicaid funds which it would pay to the nursing home, to take into account only that income and resources which the spouses actually paid to the nursing home.[1] The Seventh Circuit explained that in the event that an able, non-institutionalized spouse refused to meet her financial obligations to the nursing home, Indiana would be required under subpart (B) to make an upward adjustment in the amount of Medicaid benefits it pays on behalf of the recipient; and then, in accordance with subpart (D), the state could take all steps necessary to make full and proper collection from the unwilling spouse.

The appellate court thus fully resolved any apparent conflict between the requirement of subpart (B) to consider only actually available income and resources and the authorization of subpart (D) to impose financial requirements on non-institutionalized spouses. Furthermore, it removed the possibility of a Medicaid recipient being harshly evicted from a nursing home whenever his able spouse

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[1] The Senate Finance Committee in speaking of Section 1396a(a)(17) in their report upon the Medicaid statute stated:

> Another provision is included that requires states to take into account only such income and resources as . . . are actually available to the applicant or recipient . . .
>
> These provisions are designed so that the states will not assume the availability of income which may not, in fact, be available or overvaluate income and resources which are available.

S. Rep. No. 404, 89th Cong., 1st Sess. 78, *reprinted in* [1965] *U.S. Code Cong. & Ad. News* 1943, 2018.

refused to meet her obligations. "To hold otherwise would be to deny an eligible recipient his full benefits because of the improper action of his or her spouse." Petitioner's Appendix, p. 11-12.

In conflict with the Seventh Circuit's decision below is the Fifth Circuit's opinion in *Norman v. St. Clair,* 610 F.2d 1228 (5th Cir. 1980) which held that non-institutionalized spouses must pay specified sums, unrelated to individual ability, to the nursing home care of their institutionalized spouses. In reaching this conclusion the Fifth Circuit ignored the incongruity of allowing the eviction of a Medicaid recipient from a nursing home solely because of his spouse's inability or even refusal to make payments.

Furthermore, the Fifth Circuit untenably concluded that the actually "available" language of 42 U.S.C. § 1396a(a)(17)(B) was somehow compatable with a blind assumption that a spouse could and would meet financial obligations imposed by subpart (D). *Norman v. St. Clair,* 610 F.2d at 1237. It justified this strained reconciliation of subparts (B) and (D) by speculating that with a different result, spouses would shift all income and resources to the non-institutionalized spouse and then states would be required to pay the full nursing home bills while the wealthy non-institutionalized spouse paid nothing. *Id.* at 1238, *quoted with approval in* Petitioner's Brief, p. 6. However, this speculative scenario is flawed by the simple fact that states participating in the Medicaid program are free to deny benefits to applicants who have transferred property for the purpose of becoming eligible for Medicaid. *See* Ind. Code §§ 12-1-5-1, 12-1-6-1, 12-1-7-18, 12-1-7.1-1.[2]

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[2] Of course the Seventh Circuit's resolution of this scenario would be to allow the states to make full collection efforts against able but unwilling spouses.

Petitioner has asserted that this Court ought to settle the full gamut of conflicts between the Seventh and Fifth Circuits in these medicaid "deeming" cases. However, that would be inappropriate since the Indiana General Assembly has intervened in the controversy by amending state law to provide, in effect, that financial obligations of non-institutionalized spouses will always be made by making an individualized, factual determination of such spouse's actual ability to contribute. This state law, Ind. Code § 12-1-7-14.9 (f) (Petitioner's Appendix, p. 29-31), perfectly conforms with the district court's holding below and obviates the need for this Court to decide if Indiana is allowed to take a different approach pursuant to 42 U.S.C. § 1396(a)(17).[3]

If this Court is to settle any conflicts between the Fifth and Seventh Circuits, it should be limited to the narrow question of whether 42 U.S.C. § 1396a(a)(17) allows the states to assume that an "able" spouse will always pay her assigned share to the nursing home. Respondents maintain that the Seventh Circuit fully considered and correctly decided this issue.

Respondents also note that the Eighth Circuit has decided a case related to the issues involved herein, *Herweg v. Ray*, No. 78-1664 (8th Cir., March 18, 1980). That case, however, is legally distinguishable from the conflict between the Seventh and Fifth Circuits because Iowa (the involved state) participates in the Medicaid program pursuant to 42 U.S.C. § 1396a(a)(10)(A) and is known as a "SSI-state" while Indiana and Mississippi participate pursuant to 42 U.S.C. § 1396a(f) and are known as "§ 209(b)"

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[3] Furthermore, petitioner Stanton did not file a cross-appeal of the district court's determination that Mrs. Brown's financial obligations to the nursing home had to be individually determined and thus he has waived his right to request this Court to address the issue.

states. The two different types of states are governed by different "deeming" regulations.[4] Petitioner neither cited to nor relied on *Herweg v. Ray* in his Petition. Nevertheless, to the extent that the Eighth Circuit opinion conflicts with the Seventh Circuit, it is only on the question of whether under 42 U.S.C. § 1396a(a)(17) a state may assume that an able spouse will always actually pay her assigned share to the nursing home. As stated above, it is respondent's position that the Seventh Circuit fully considered and correctly decided that issue.

2. The Decision of the Court of Appeals Concerning Attorneys' Fees Is Correct, Consistent With Prior Decisions of this Court, and Is Not In Conflict With Decisions of Other Circuits.

The court of appeals remanded this case to the district court for a determination of the amount of fees plaintiffs were entitled to as prevailing parties in the district court. The court of appeals held that "the district court, erred in its constricted view that it lacked discretionary authority to award fees where plaintiffs prevailed on a statutory rather than a constitutional claim." No determination has yet been made by the district court on remand regarding attorneys' fees. Thus, the petition for certiorari is premature.

In the petition for certiorari, welfare administrator,

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[4] The deeming regulations for SSI states are at 42 C.F.R. § 435.723(d) while those for § 209(b) states are at 42 C.F.R. §§ 435.734, 436.602, 436.711 and 436.821. *Gray Panthers v. Secretary of H.E.W.*, 461 F. Supp. 319 (D.D.C. 1978), *appeal docketed,* No. 79-1334 (D.C. Cir. March 27, 1979) (oral argument on January 15, 1980) declared the § 209(b) regulations to be contrary to 42 U.S.C. § 1396a(a)(17) and ordered the Secretary to issue new regulations. These new regulations were proposed November 21, 1979, 44 *Fed Reg.* 66855. The Seventh Circuit's decision in *Brown v. Stanton* is in complete harmony with them while the Fifth Circuit's decision is contrary to them.

Wayne A. Stanton, speculates that the effect of the remand by the court of appeals is to deprive the district court of discretion inherent in 42 U.S.C. § 1988 to determine fee awards. At this stage of this case, the petitioners have not suffered any harm and this Court should not grant certiorari to review a decision in which further action by the district court serves to make remote the issue presented to the Court. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). To put it simply, the Court would have to grasp at straws in the wind to review the attorneys' fees issue.[5]

The decision of the court of appeals that the district court should not deny fees solely because the case was resolved on statutory rather than constitutional grounds is consistent with this Court's decision in *Rosado v. Wyman,* 397 U.S. 400, 402 (1970) and *King v. Smith,* 392 U.S. 309 (1968) as well as *Hagans v. Lavine,* 415 U.S. 528 (1974) and the previous decision of the Court of Appeals for the Seventh Circuit in *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977) *cert. denied,* 438 U.S. 916 (1978).

These cases held quite properly that a federal court should avoid determining constitutional questions and resolve cases on statutory or other non-constitutional grounds whenever possible. The district court correctly followed this doctrine in resolving this case on statutory grounds.

The legislative history of the attorneys' fees Act also specifically contemplated that the above approach should be followed and fees awarded in cases ultimately resolved

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[5] In *Gagne v. Maher,* 594 F.2d 336 (2d Cir. 1979), *cert. granted,* 100 S.Ct. 44 (1979), the district court made an actual award of fees in the amount of $3012.19 which presented a clearer case of harm to the state welfare officials in Connecticut. In the instant case, the trial court has not ruled on remand or denied Respondents' petition for attorney fees in the amount of $5184.00.

on statutory grounds. H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 4,n.7 (1976). The petitioner Stanton argued that attorneys' fees should be denied because the statutory claim, alone, is clearly sufficient to obtain the desired relief. It was necessary for the Medicaid recipient and spouse to institute litigation and pursue litigation all the way through a hearing on the merits of the Medicaid deeming issue in order to secure relief. The welfare officials had the option of terminating their illegal policies at any stage of the litigation or before litigation was instituted and thereby limit attorneys' fees. They chose to continue their unlawful deeming practices until enjoined by the district court. The petitioner's logic would encourage state officials to violate clear statutory rights, knowing that a federal court will always resolve the case on the statutory ground: the clearer a statutory right and violation, the less appropriate the award of attorneys' fees.

The decisions cited by the petitioner as creating a conflict with the decision of the court of appeals clearly do not establish any conflict at all. In these cases, *Aho v. Clark,* 608 F.2d 367 (9th Cir. 1979), *Buxton v. Patel,* 595 F.2d 1182 (9th Cir. 1979), and *Zarcone v. Perry,* 581 F.2d 1039 (2d Cir. 1978) *cert. denied,* 439 U.S. 1072 (1979), the Courts distinguished cases which sought damages from those, such as the instant case, which sought only declaratory and injunctive relief. With respect to the latter type of cases, the cases cited by petitioner held that on attorneys' fees petitions based on 42 U.S.C. § 1988, "successful civil rights plaintiffs should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Aho v. Clark,* 608 F.2d 365, 367, *quoting Zarcone v. Perry,* 581 F.2d at 1042, which, in turn, was *quoting* from *Newman v. Piggie Park Enterprises, Inc.,* 390

U.S. 400, 402 (1968). The Seventh Circuit decision below is in absolute harmony with these other cases as it remanded to the district court for a determination if any "special circumstances" existed which would render an attorney fee award unjust. Petitioner's Appendix, p. 16. Contrary to petitioner Stanton's contention, the opinion below does not conflict with any of the decisions of the other circuits.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 29, 1980.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

ELIZABETH BROWN and JAMES BROWN by his next friend MICHAEL BROWN, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* No. 79-1459 vs. WAYNE A. STANTON, individually and as the Administrator of the Indiana Department of Public Welfare, and ELIZABETH SAMKOWSKI, individually and as Director of the Marion County (Indiana) Department of Public Welfare, *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana. No. IP 78-773-C James E. Noland Judge

O R D E R

The Slip Opinion filed by this court on January 30, 1980, is hereby amended as follows:

1. Page 9, Line 1—Add an asterisk after the citation 45 C.F.R. § 248.3(b)(2)(i) and a footnote at the bottom of the page to read as follows:

(*) Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

* 43 Fed. Reg. 45204 recodified this provision as 42 C.F.R. § 435.723(c).

2. Page 9, Footnote 10, Line 3—Add a double asterisk after the citation 42 C.F.R. § 448.3(b)(2)(ii) (1977) and an additional footnote at the bottom of the page to read as follows:

   ** 43 Fed. Reg. 54204 recodified this provision as 42 C.F.R. § 435.723(d).

3. Page 14, Line 10—Correct the citation § 435.133 (f) to read § 433.135(f).

4. Page 14—Footnote 14, Line 20—Following the word 'relatives,' add the following language:

   'not to permit presumptions forbidden elsewhere in the statute. Oregon until recently had such a mechanism,'

5. Page 14, Footnote 14, Line 20—Substitute the words 'Medical Assistance' for the words 'Medicaid assistance'.

6. Page 17, Line 12—Correct the citation 594 F.2d 345 to read 594 F.2d 336.